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No. 71-723

# In the Supreme Court of the United States

OCTOBER TERM, 1971

HOWARD J. MEISTER,

*Petitioner,*

vs.

LeROY L. DALTON,

*Respondent.*

## SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

NORMAN C. SKOGSTAD
1211 Bridge Street
Grafton, Wisconsin 53024

GERALD P. BOYLE
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
*Attorneys for Petitioner*

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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## SUPPLEMENTAL APPENDIX

## APPENDIX B

## OPINION OF THE COURT

(Filed June 29, 1971)
No. 9
August Term, 1970

STATE OF WISCONSIN : IN SUPREME COURT

LeROY L. DALTON, Respondent,

vs.

HOWARD J. MEISTER, Appellant.

APPEAL from a judgment of the circuit court for Milwaukee county: ANDREW W. PARNELL, Circuit judge of the 10th Judicial Circuit, Presiding. *Affirmed.*

On November 27, 1967, LeRoy L. Dalton commenced this defamation action against Howard J. Meister, alleging acts of libel and slander. The defense is the statements are true and within the range of fair comment of a public official. The case was tried to a jury which returned a verdict in favor of Dalton, assessing $75,000 compensatory damages and $200,000 punitive damages. The trial court affirmed the compensatory damages but applied the *Powers* rule[1] and reduced the punitive damages to $75,000. Meister appeals and Dalton seeks a review of the trial court's order reducing the amount of punitive damages.

[1] *Powers* v. *Allstate Ins. Co.* (1960), 10 Wis. 2d 78, 102 N. W. 2d 393.

HALLOWS, C.J. Meister raises two issues on this appeal: (1) That he was prejudiced by the rulings of the trial court which excluded evidence of the details of a John Doe and a grand jury proceedings; and (2) that the damages awarded by the jury and approved by the trial court are excessive. We think there is no merit in either contention.

Dalton at the time of trial was 45 years of age, had been an attorney since 1953, and was an assistant attorney general. In 1963 he became the head of the newly-created criminal-investigation division of the attorney general's office. He has had experience in John Doe investigations, investigations involving election-law violations, and grand juries in various counties.

At the time of trial Meister was a banker with other interests including real estate, insurance, and various businesses. Testimony at the trial showed his wealth by his own admission was between two and two and one-half million dollars. Meister was charged with criminal bribery and also unlawful lobbying. On May 5, 1967, in La Crosse the criminal charges of bribery were dismissed on the ground the state witness, a Miss Dorothy Effinger, was too sick to testify. These charges were a result of a grand-jury investigation conducted in Dane county in which Dalton was involved as assistant attorney general. Meister was later tried in Madison on charges of unlawful lobbying which resulted from a secret John Doe proceeding and was acquitted.

Immediately following the dismissal of the criminal charges of bribery in La Crosse, Meister held a meeting in the courtroom with the members of the news media at which he distributed typewritten copies of a typewritten

statement which is the basis of the libel in this case.[2] Meister testified the statement was prepared by him personally the evening before trial in anticipation the bribery charges against him would be dismissed. The statement was widely published by the news media. The evidence

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[2] "NEWS RELEASE—FOR IMMEDIATE RELEASE.— BY HOWARD J. MEISTER

Eleven months ago, I was indicted by a Grand Jury, illegally constituted, and immoral in every sense of modern day terminology conceived by gestapo leader, Le Roy Dalton, who is now slithering under his rock.

Today, everyone knows that any and all charges made against me were groundless and conceived in the evil minds of those who thought that through illegal means they could successfully smear me.

It is now my duty to inform the public that the gestapo, the cancer in the Attorney General's office must be cut out. I for one shall lead that fight, and good men shall join me.

I must further state that Miss Dorothy Effinger, a known extortionist, is no sicker today than she was seven days ago when she whistled and danced in the halls of the Dane County District Attorney's office. Less than twenty-four hours before the start of this trial, she went over the facts of her extortion attempts of me with the District Attorney, with no claim of illness.

Her perjury before the Grand Jury under the ring-master Dalton has agonized my mother, my lovely wife and my four children to a point I cannot comment on.

Miss Effinger is a liar, an extortionist and is no more ill than she was eleven months ago when her perjured testimony was purchased for immunity for her various crimes. I challenge this female, Dalton and District Attorney Boll to deny the truth of my statement.

I state, as God as my witness, I am guilty of being a good citizen, fighting for my rights. District Attorney Boll, violating

also showed Meister attempted through influence and political pressure and the spending of large sums of money to have Dalton removed from his job. Meister had meetings with the news media and complained of Dalton. There is a dispute in the testimony concerning the political pressure Meister exerted on the then attorney general Bronson La Follette to remove Dalton from office. La Follette finally removed Dalton but testified that the removal was not the result of the political influence of Meister,—a statement the jury apparently did not belief. The evidence

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(Footnote continued)

his oath of office, legal ethics and common decency, joined hands with Dalton and Effinger in furtherance of this campaign to smear me. I now state that any reports of threatening phone calls are false and were born of desperation in a last minute effort to prevent the truth from coming out. The only phone call the District Attorney Boll received was from 'anonymous' Dalton.

Mr. Boll is a sham and a fraud and should be removed from office. He has violated his oath to protect the innocent and has shocked my conscience by openly and publicly admitting that the facts of her crime of extortion in this case were known by District Attorney Boll. He attempted to take a case to court in which he states he had only one witness and I state that that witness should be jailed by Mr. Boll.

I state that Miss Effinger tried to extort substantial money from me. The temptation to be relieved of these pressures through extortion was so loathsome that I am stunned that District Attorney Boll can even talk to the press without first answering the simple question 'Why don't you prosecute Dorothy Effinger?'

I now invite gestapo leader Dalton and S. S. Corporal Boll to investigate me, as I know they will, to continue their unorthodox crucificion of Howard J. Meister."

plainly shows a persistent course of conduct on the part of Meister in his retaliation to "get Dalton."

The contention the trial court erred in excluding evidence of the John Doe and the grand jury proceedings has no basis in fact. Meister argues he had a right, in order to prove Dalton used "Gestapo tactics," to present the question and answer testimony of various witnesses in John Doe and grand jury proceedings. The restrictions upon the admissibility of evidence occurred in the cross-examination of Dalton's witnesses who had been involved in the various John Doe and grand jury proceedings and who had given their opinion on direct examination concerning the manner in which Dalton had conducted himself generally and had treated the witnesses in particular during the secret proceedings. The ruling of the trial court was to the effect that neither the details nor the merits of the proceedings could be inquired into on cross-examination but the conduct of Dalton about which the witnesses had offered their opinions could be.

We think the trial court was right in so limiting the cross-examination. The proceedings were secret and the exact questions and answers were immaterial on the issue of the manner in which Dalton was conducting the proceedings. A witness knows when he is "brow beaten" by an interrogator. A judge who presides over grand jury hearings knows when an attorney uses Gestapo tactics. In refusing the so-called offer of proof by Meister's counsel, the court stated, "The court at no stage of the proceeding refused or intimated that it would refuse the reception of evidence pertaining to the quality of manner of handling witnesses by Mr. Dalton in any proceeding." The offer of proof did not meet this standard.

Meister now asserts the trial court should have reviewed the records of the secret proceedings *in camera* to determine whether in fact they had any bearing on the issues, but no such request was made to the trial court. The record does disclose that prior to trial Meister attempted to gain access to the files of the attorney general which request was denied by Circuit Judge M. Eugene Baker of the First Judicial Circuit after an *in camera* review. Judge Baker ordered the secrecy of the proceedings be maintained and Judge Parnell's rulings at trial were consistent.

Meister contends the award of $75,000 in compensatory damages is so excessive and unsupported in the record as to be the result of passion and prejudice. We think not.

In libel actions a successful plaintiff may receive several kinds of damages. Proof of damage in libel as distinguished from some types of slander is not essential to the cause of action. *Martin* v. *Outboard Marine Corp.* (1962), 15 Wis. 2d 452, 461, 113 N. W. 2d 135. In *Martin*, after discussing the history of defamation, we adopted the common-law rule of libel as stated in Restatement, 3 Torts; *Defamation*, p. 165, sec. 569. In libel and slander *per se* the law presumes harm which normally results from the defamation. In many cases the harm wrought by defamation is so subtle and indirect it is difficult of monetary proof. Restatement, 3 Torts, *Measure of Damages in Actions for Defamation*, p. 314, sec. 621. *See Williams* v. *Hicks Printing Co.* (1914), 159 Wis. 90, 100, 150 N. W. 183. But in this case Dalton has proved actual and specific damages resulting from the libel and he is entitled to recover for them. Restatement, 3 Torts, p. 316, sec. 622, also p. 185, sec. 575, and p.p. 318, 319, sec. 623. Since the libel by Meister was found by the jury to be activated

by express malice, Dalton is also entitled to recover punitive damages. *See Malco* v. *Midwest Aluminum Sales* (1961), 14 Wis. 2d 57, 63, 109 N. W. 2d 516.

While Meister claims Dalton suffered no damages to his reputation or in any other way, this argument finds little support in the law or in the record of this case. We think the evidence of specific and special harms sustains the verdict for $75,000 compensatory damages and agree with the trial court when it stated, "The jury was fully justified in drawing the reasonable inferences that defendant's persuasive and pervasive course of conduct in maliciously issuing false, defamatory and non-privileged libelous and slanderous statements concerning the plaintiff caused his transfer from high position, the disfavor of the Attorney General, the loss of his reputation as a criminal investigator, the abuse of his character as a lawyer, public contempt, ridicule, disgrace and humiliation as a prominent citizen and as a qualified and accepted lawyer and his consequential and continuing mental suffering and anxiety." It is true some of these elements may also be considered in assessing general compensatory damages, others constitute only specific harm. 50 Am. Jur. 2d, *Libel and Slander*, p. 881, sec. 356, *et seq.*

Meister also challenges the amount of punitive damages awarded Dalton was the result of prejudice and passion. The trial court, however, found no prejudice or passion and pursuant to the *Powers* rule, first applied to punitive damages in *Malco* v. *Midwest Aluminum Sales*, *supra*, reduced the award of punitive damages as being excessive from $200,000 to $75,000. Dalton exercised the option to accept the reduced award, remitting the excess, and avoided a new trial. He now seeks under sec. 274.12, Stats., a review of the reduction, which he can do under *Plesko* v.

*Milwaukee* (1963), 19 Wis. 2d 210, 220, 120 N. W. 2d 130, without waiving the benefits of his acceptance.

The purpose of punitive damages is stated in *Malco,* at p. 66: "Punitive damage is given on the basis of punishment to the injured party not because he has been injured, which injury has been compensated with compensatory damages, but to punish the wrongdoer for his malice and to deter others from like conduct. Punitive damage ought to serve its purpose. Consideration should be given to the wrongdoer's ability to pay and the grievousness of his acts, the degree of malicious intention, and potential damage which might have been done by such acts as well as the actual damage." *See* also *Gladfelter* v. *Docmel* (1958), 2 Wis. 2d 635, 647, 87 N.W. 2d 490; *Kink* v. *Combs* (1965), 28 Wis. 2d 65, 79, 135 N. W. 2d 789. The trial court in reducing the punitive damage considered $75,000 would represent a reasonable amount in light of this test and "the relentless pursuit of defendant's malevolent designs almost to the eve of trial." Since the trial court considered the wealth of Meister to be approximately two and a half million dollars, it thought a lesser amount would not accomplish the purpose of being punitive and deterrent in nature and a higher amount might well be regarded as a result of over-reaction by way of penalty. We agree.

While there is no arithmetic proportion to which punitive damages should relate to the wealth of the defendant or to the damage done the plaintiff, we think punitive damages in an amount equal to compensatory damages founded on special harm is reasonable. Whi[illegible]0,000 may be the highest amount heretofore approved by this court for punitive damages, *Lisowski* v. *Chenenoff* (1968), 37 Wis. 2d 610, 155 N. W. 2d 619, this court has set no arbitrary maximum. In *Malco* punitive damages of approximately

seven and one-half percent of the defendant's wealth was approved. In *Fuchs* v. *Kupper* (1963), 22 Wis. 2d 107, 125 N. W. 2d 360, an award of twelve and one-half percent was approved.

In his last argument, Meister contends the evidence presented concerning his net worth was incompetent because it did not relate in any meaningful way to the defendant's net worth at the time of trial. The evidence was not objected to by Meister at the time it was presented nor was this issued raised by motions after verdict; hence, the issue may not be raised now as a matter of right.

However, due to the importance of the question, we will briefly discuss the question of law involved. A defendant's worth for the purpose of determining punitive damages need not be determined exactly as of the day of trial and needs only to be reasonably accurate. The evidence that Meister's net worth was between two and two and one-half million dollars was obtained on adverse examination eight months and three and a half months prior to trial. This was the net worth of Meister at that time by his own admission.

Meister argues that in the interval between taking his deposition and the time of trial his economic situation could very well have been changed. So far as the record is concerned this is speculation. Meister did not put in any evidence of his wealth at any time and he did not appear at the trial until Dalton had rested his case. Whether this was to prevent Dalton from examining him as to his wealth, we do not know. The evidence of wealth admitted is relevant and can stand unless refuted. If Meister had suffered financial reversals during the interval, such evidence would also be admissib' as being material. But it is asking too much by way of proof to require the plain-

tiff to give an accurate balance-sheet appraisal of the defendant's wealth as of the date of trial. Since we are of the opinion the judgment appealed from should be affirmed, this requires Dalton's motion for review be denied.

While this case was awaiting oral argument, the United States Supreme Court decided Rosenbloom v. Metromedia, Inc. (June 7, 1971), 39 U. S. Law Week 4695, in which the majority of the court held in a plurality of opinions that the doctrine of *New York Times* v. *Sullivan* (1964), 376 U. S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686, applied to a state's civil libel action brought by a private individual for a defamatory falsehood uttered by a news media concerning the individual's involvement in an event of public or general interest. This case is not applicable here. The instant case was tried under the current libel laws as discussed in *Lathan* v. *Journal Co.* (1966), 30 Wis. 2d 146, 140 N. W. 2d 417, and in *Ranous* v. *Hughes* (1966), 30 Wis. 2d 452, 141 N. W. 2d 251. Dalton was a public figure. The subject matter of the libel was of public or general interest and Meister was recognized as having a "conditional privilege" of commenting. The case was tried under the "greater weight" of the evidence standard of proof and the jury found the defamatory statements were untrue and Meister abused his privilege because the statements were made with malice and knowledge of their falsity.

The *Times-Sullivan* rule recognized the constitutional guaranties of freedom of speech and of press place limitations upon state libel laws. Two important limitations in cases involving public interest seem to be: (1) The standard of proof is not the greater weight of the evidence but the "clear and convincing proof,"—this to give the

freedoms "adequate breathing space;" and (2) negligence is out as a basis of liability and a willfulness based on knowledge is a substitute, *i.e.*, the defamatory falsehood must be published with knowledge that it is false or with reckless disregard of whether it was false or not.

The *Times-Sullivan* rule is not confined to news media and free press but also applies to private individuals and free speech in some cases. *See St. Amant* v. *Thompson* (1968), 390 U. S. 727, 88 Sup. Ct. 1323, 20 L. Ed. 2d 262, an action by a deputy sheriff against a defeated candidate for the United States Senate; *Lynn* v. *Plant Guard Workers* (1966), 383 U. S. 53, 86 Sup. Ct. 657, 15 L. Ed. 2d 582, an action by an official of an employer against the labor union. While two of the justices of the United States Supreme Court see constitutional overtones in awarding punitive damages and would strike down such damages on constitutional grounds and allow only damages for actual losses, the court in *Rosenbloom* did not reach that question. Neither that question nor the burden-of-proof issue was raised in this case, but we might observe that even a casual reading of this record would lead one to believe as a matter of law that the proof of malice and knowledge of falsity or the reckless disregard of the truth was by clear and convincing evidence.

*By the Court.*—Judgment affirmed and motion for review denied.

## APPENDIX C

### MOTION FOR REHEARING DENIED

And afterwards, to-wit: on the 8th day of September, A. D. 1971, the same being the 6th day of the August, 1971 term of said Court, the following proceedings were had in said cause in this Court:

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LeRoy L. Dalton,

Respondent,

vs.

Howard J. Meister,

Appellant.

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The Court now being sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with costs.